COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-820

COMMONWEALTH

vs.

COREY A. SLAVEN.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After a jury-waived trial, the defendant was convicted of various sex offenses against three victims, including rape of one of the victims, Lisa Jones.[1] He now appeals from the denial of his second motion for a new trial, arguing that the evidence was insufficient to support the rape conviction and that his trial counsel was ineffective. We affirm.

1. Sufficiency of the evidence. The fact finder could have found the following facts related to the rape conviction. The defendant lived in New York from 2001 until December 2007 but would regularly visit his sister's Falmouth home during school breaks. On July 4, 2007, Jones was babysitting during a party at the Falmouth house of one of her father's friends. While heading to the bathroom, Jones saw a man whom she later

[1] A pseudonym.

identified as the defendant. The defendant pushed the bathroom door open and said that "he'd be nice to [Jones]." The defendant then choked Jones, pulled her pants down, and raped her for approximately ten minutes. During the rape Jones was on the ground, and the defendant was on top of her, "face-to-face."

The defendant's current sufficiency challenge raises a discrete issue -- namely, he argues that the conviction cannot be sustained because there was overwhelming evidence that he was not in Falmouth during the summer of 2007.[2] But to the contrary, viewing the evidence in the light most favorable to the Commonwealth, see Commonwealth v. Ayala, 481 Mass. 46, 51 (2018), a rational trier of fact could have found that the defendant was in Falmouth at that time. In response to the question -- "[a]nd was there an incident around 4th of July in 2007 regarding the defendant?" -- Jones responded, "Yes. He raped me." Furthermore, Jones identified the defendant as her attacker and indicated that she was "certain" that the rape occurred in the summer of 2007.

Pointing to his own testimony and that of his sister, the defendant claims that his alibi evidence was "far stronger" than

[2] Although the defendant did not move for a required finding of not guilty on this ground, we still consider his argument because a conviction resting on insufficient evidence creates a substantial risk of a miscarriage of justice. See Commonwealth v. Grandison, 433 Mass. 135, 140 n.8 (2001).

Jones's testimony. We disagree. The sister testified only that she "[did]n't believe" that the defendant stayed at her home in the summer of 2007, while acknowledging that she had no specific recollection of the exact dates he was there. Similarly, while the defendant testified at one point that he was not in Falmouth in the summer of 2007, he later testified that he "could have been there" at that time but was "really not sure." Thus, unlike Commonwealth v. Woods, 382 Mass. 1, 9 (1980), on which the defendant relies, there was no "firm proof" of the defendant's alibi. Rather, the judge, acting as fact finder, was entitled to credit Jones's testimony over the arguably conflicting testimony of the defendant and his sister. See Commonwealth v. Martin, 467 Mass. 291, 315 (2014). Cf. Woods, supra at 9 (defendant entitled to new trial where alibi evidence, in form of furlough records, was "not materially contingent on assessments of credibility" and "virtually . . . exclude[d] as a practical matter the defendant's presence outside the institution at given times").

2. Ineffective assistance of counsel. The defendant next raises three claims of ineffective assistance of counsel. We discern no "significant error of law or other abuse of discretion" in the judge's rejection of these claims. Commonwealth v. Simon, 481 Mass. 861, 866 (2019), quoting

Commonwealth v. Duart, 477 Mass. 630, 634 (2017), cert. denied, 138 S. Ct. 1561, (2018).[3]

The defendant's first claim involves trial counsel's purported failure to seek information about the circumstances of Jones's identification of the defendant. At trial both Jones and the defendant's niece, Mary Smith,[4] testified about a conversation they had in or around 2010, during which they revealed to one another that they each had been sexually assaulted.[5] Jones testified that, during this conversation, Smith stated that the defendant had raped her after saying, "he would be nice to her" -- which Jones recognized as the "same thing" he told her before the July 2007 rape. The defendant argues that the suggestiveness of this conversation should have led counsel to seek discovery and further investigate how Jones ultimately came to identify the defendant as her assailant.

The defendant has failed to show either that counsel's performance fell below that of an ordinary fallible lawyer or that it deprived the defendant of a substantial ground of defense. See Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). The defendant did not provide an affidavit from counsel to

[3] Because the motion judge was also the judge who presided at trial, we give "special deference" to his findings. Commonwealth v. Grace, 397 Mass. 303, 307 (1986).

[4] A pseudonym.

[5] The defendant was convicted of several charges for conduct pertaining to Smith.

support his claim or an adequate explanation for his failure to do so. Thus, the record does not reveal what information counsel had regarding the circumstances of Jones's identification of the defendant prior to trial. Nor does the record reveal if additional investigation or discovery would have uncovered information giving rise to a substantial ground of defense. The judge was thus within his discretion to conclude that the defendant's motion did not present a substantial issue warranting an evidentiary hearing. See Commonwealth v. Lys, 481 Mass. 1, 5-6 (2018).

The defendant's second, related claim is that trial counsel was ineffective for failing to move to suppress or exclude Jones's in-court identification. In assessing this claim, we evaluate counsel's performance under the state of the law existing at the time of trial in 2013. See Commonwealth v. Collins, 470 Mass. 255, 261 (2014). Under the law at that time, an in-court identification was inadmissible if "in the totality of the circumstances, it was 'tainted by an out-of-court confrontation . . . that [was] so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" Commonwealth v. Bonnett, 472 Mass. 827, 836 (2015), quoting Commonwealth v. Bastaldo, 472 Mass. 16, 31 (2015). See Commonwealth v. Botelho, 369 Mass. 860, 866 (1976). "In all but unusual cases, an impermissibly suggestive out-of-

court confrontation would render an in-court identification inadmissible only if the confrontation had been 'arranged by the Commonwealth.'" Bonnett, 472 Mass. at 836, quoting Commonwealth v. Alcide, 472 Mass. 150, 165 (2015). Thus, "[a]n in-court identification was admissible in the absence of any prior out-of-court confrontation." Bastaldo, 472 Mass. at 31.[6]

Here, there is no evidence in the record that the Commonwealth arranged an out-of-court confrontation between Jones and the defendant. Nor is there evidence that any such out-of-court confrontation was impermissibly suggestive.[7] Absent evidence concerning what, if any, pretrial identification procedure occurred and trial counsel's knowledge thereof, the judge was warranted in finding that it was not manifestly

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[6] In Commonwealth v. Crayton, 470 Mass. 228, 241-242 (2014), the Supreme Judicial Court announced a prospective rule that, if no pretrial identification procedure occurred, an in-court identification will be treated as a showup and admitted only when there is "good reason" to do so. Because the defendant's trial took place in 2013, this rule has no application to this case. See Collins, 470 Mass. at 265-266.

[7] We recognize that the Supreme Judicial Court held in Commonwealth v. Jones, 423 Mass. 99, 109 (1996), that "[i]f a witness is involved in a highly suggestive confrontation with a defendant and that witness's in-court identification of the defendant is not shown to have a basis independent of that confrontation, the admissibility of the witness's proposed testimony identifying the defendant should not turn on whether government agents had a hand in causing the confrontation." The fact remains, however, that there is no evidence of a highly suggestive confrontation on this record. Furthermore, Jones appeared to have had ample opportunity to view the defendant's face during the rape.

unreasonable for counsel not to move to suppress or exclude Jones's in-court identification. See Commonwealth v. Kolenovic, 471 Mass. 664, 673-674 (2015). See also Commonwealth v. Conceicao, 388 Mass. 255, 264 (1983) ("It is not ineffective assistance of counsel when trial counsel declines to file a motion with a minimal chance of success"). For the same reasons, the defendant has not shown that he was deprived of a substantial ground of defense.

The defendant's final claim pertains to counsel's allegedly deficient advice about waiving a jury trial. In the affidavit he submitted with his motion, the defendant asserted that counsel misrepresented that the jury "would be all old white women" and failed to explain that the defendant was entitled to an impartial jury chosen from a venire representing a fair cross-section of the community. The defendant further asserted that, had he received accurate information about his rights, he would not have waived a jury trial. But again, without an affidavit from counsel, the judge was within his discretion to find that the defendant failed to raise a substantial issue warranting an evidentiary hearing. See Lys, 481 Mass. at 6. "In making this determination, a motion judge need not accept

statements in the defendant's affidavit[] as true, even if the statements are undisputed." Id. at 5.[8]

Order denying second motion for new trial affirmed.

By the Court (Kinder, Sacks & Shin, JJ.[9]),

Joseph F. Stanton

Clerk

Entered: October 28, 2019.

[8] We note also that, before accepting the defendant's waiver, the judge conducted a colloquy in which he informed the defendant that he had "the absolute right under the Constitution to have this matter tried before [twelve] citizens of Barnstable County who would be randomly selected from the community at large."

[9] The panelists are listed in order of seniority.